

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

KEVIN A. SIMNICK,

Petitioner,

v.

BRIAN GAGE,

Respondent.

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8:13CV221

**MEMORANDUM
AND ORDER**

The court has conducted an initial review of the Petition for Writ of Habeas Corpus (Filing No. [1](#)) to determine whether the claims made by Petitioner are, when liberally construed, potentially cognizable in federal court. Condensed and summarized for clarity, Petitioner's claims are set forth below.

- Claim One: Petitioner was denied due process of law in violation of the Fourteenth Amendment because the trial court lacked subject-matter jurisdiction to try the case. (*Id.* at CM/ECF pp. 20-21.)
- Claim Two: Petitioner was denied due process of law in violation of the Fourteenth Amendment because the prosecutor was allowed to file an information that was insufficient and defective. (*Id.* at CM/ECF pp. 21-24.)
- Claim Three: Petitioner was denied due process of law in violation of the Fourteenth Amendment because the prosecutor withheld exculpatory evidence. (*Id.* at CM/ECF pp. 24-25.)
- Claim Four: Petitioner was denied due process of law in violation of the Fourteenth Amendment because his plea "was not voluntarily, knowingly, understandingly and intelligently made." (*Id.* at CM/ECF pp. 26-29.)
- Claim Five: Petitioner was denied due process of law in violation of the Fourteenth Amendment because the prosecution

induced him into pleading guilty by misrepresenting a plea agreement that it later breached. (*Id.* at CM/ECF pp. 29-30.)

Claim Six: Petitioner was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments because trial counsel failed to (a) object to the lack of the trial court's subject matter jurisdiction; (b) advise him of the true nature of the charge before he pled; (c) inform him of the penalties of the charge before he pled; (d) object to the invalid factual basis for the plea; (e) object to the breach of the plea agreement at sentencing; (f) contest the insufficient and defective information; and (g) conduct a reasonable investigation into the case. (*Id.* at CM/ECF pp. 30-37.)

Claim Seven: Petitioner was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments because appellate counsel failed to "raise or properly argue meritorious claims on direct appeal." (*Id.* at CM/ECF p. 38.)

Liberally construed, the Court preliminarily decides that Petitioner's seven claims are potentially cognizable in federal court. However, the Court cautions that no determination has been made regarding the merits of these claims or any defenses thereto or whether there are procedural bars that will prevent Petitioner from obtaining the relief sought.

Petitioner also seeks the appointment of counsel. (Filing No. [2](#).) "There is neither a constitutional nor statutory right to counsel in habeas proceedings; instead, [appointment] is committed to the discretion of the trial court." [*McCall v. Benson*, 114 F.3d 754, 756 \(8th Cir. 1997\)](#). As a general rule, counsel will not be appointed unless the case is unusually complex or the petitioner's ability to investigate and articulate the claims is unusually impaired or an evidentiary hearing is required. See, e.g., [*Morris v. Dormire*, 217 F.3d 556, 558-59 \(8th Cir. 2000\)](#), *cert. denied*, 531 U.S. 984 (2000); [*Hoggard v. Purkett*, 29 F.3d 469, 471 \(8th Cir. 1994\)](#)

(citations omitted). *See also* Rule 8(c) of the *Rules Governing Section 2254 Cases in the United States District Courts* (requiring appointment of counsel if an evidentiary hearing is warranted.) The court has carefully reviewed the record and finds that there is no need for the appointment of counsel at this time.

IT IS ORDERED:

1. Upon initial review of the Petition (Filing No. 1), the Court preliminarily determines that Claims One through Seven, as set forth in this Memorandum and Order, are potentially cognizable in federal court.

2. The Clerk's Office is directed to mail copies of this Memorandum and Order and the Petition to Respondent and the Nebraska Attorney General by regular first-class mail.

3. By **November 25, 2013**, Respondent shall file a motion for summary judgment or state court records in support of an answer. The Clerk's Office is directed to set a pro se case management deadline in this case using the following text: November 25, 2013: deadline for Respondent to file state court records in support of answer or motion for summary judgment.

4. If Respondent elects to file a motion for summary judgment, the following procedures shall be followed by Respondent and Petitioner:

- A. The motion for summary judgment shall be accompanied by a separate brief, submitted at the time of the filing of the motion.
- B. The motion for summary judgment shall be supported by such state court records as are necessary to support the motion. Those records shall be contained in a separate filing entitled: "Designation of State Court Records in Support of Motion for Summary Judgment."
- C. Copies of the motion for summary judgment, the designation, including state court records, and Respondent's brief shall be served upon Petitioner *except* that Respondent is only required

to provide Petitioner with a copy of the specific pages of the record which are cited in Respondent's brief. In the event that the designation of state court records is deemed insufficient by Petitioner, Petitioner may file a motion with the court requesting additional documents. Such motion shall set forth the documents requested and the reasons the documents are relevant to the cognizable claims.

- D. No later than 30 days following the filing of the motion for summary judgment, Petitioner shall file and serve a brief in opposition to the motion for summary judgment. Petitioner shall submit no other documents unless directed to do so by the court.
- E. No later than 30 days after the filing of Petitioner's brief, Respondent shall file and serve a reply brief. In the event that Respondent elects not to file a reply brief, he should inform the court by filing a notice stating that he will not file a reply brief and that the motion is therefore fully submitted for decision.
- F. If the motion for summary judgment is denied, Respondent shall file an answer, a designation and a brief that complies with terms of this order. (See the following paragraph.) The documents shall be filed no later than 30 days after the denial of the motion for summary judgment. **Respondent is warned that the failure to file an answer, a designation and a brief in a timely fashion may result in the imposition of sanctions, including the release of Petitioner.**

5. If Respondent elects to file an answer, the following procedures shall be followed by Respondent and Petitioner:

- A. By **November 25, 2013**, Respondent shall file all state court records which are relevant to the cognizable claims. See, e.g., Rule 5(c)-(d) of the *Rules Governing Section 2254 Cases in the United States District Courts*. Those records shall be

contained in a separate filing entitled: "Designation of State Court Records In Support of Answer."

- B. No later than 30 days after the filing of the relevant state court records, Respondent shall file an answer. The answer shall be accompanied by a separate brief, submitted at the time of the filing of the answer. Both the answer and brief shall address all matters germane to the case including, but not limited to, the merits of Petitioner's allegations that have survived initial review, and whether any claim is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, a statute of limitations, or because the petition is an unauthorized second or successive petition. See, e.g., Rules 5(b) and 9 of the *Rules Governing Section 2254 Cases in the United States District Courts*.
- C. Copies of the answer, the designation, and Respondent's brief shall be served upon Petitioner at the time they are filed with the court *except* that Respondent is only required to provide Petitioner with a copy of the specific pages of the designated record which are cited in Respondent's brief. In the event that the designation of state court records is deemed insufficient by Petitioner, Petitioner may file a motion with the court requesting additional documents. Such motion shall set forth the documents requested and the reasons the documents are relevant to the cognizable claims.
- D. No later than 30 days following the filing of Respondent's brief, Petitioner shall file and serve a brief in response. Petitioner shall submit no other documents unless directed to do so by the court.
- E. No later than 30 days after the filing of Petitioner's brief, Respondent shall file and serve a reply brief. In the event that Respondent elects not to file a reply brief, he should inform the court by filing a notice stating that he will not file a reply brief

and that the merits of the petition are therefore fully submitted for decision.

- F. The Clerk of the court is directed to set a pro se case management deadline in this case using the following text: **December 23, 2013**: check for Respondent's answer and separate brief.

6. No discovery shall be undertaken without leave of the Court. See Rule 6 of the *Rules Governing Section 2254 Cases in the United States District Courts*.

7. Petitioner's Motion for Appointment of Counsel (Filing No. [2](#)) is denied without prejudice to reassertion.

8. Petitioner's Motion for Status (Filing No. [5](#)) is granted to the extent it is consistent with this Memorandum and Order. The Court has received payment of the filing fee in this matter in the amount of \$5.00. No overpayment has been received and no refund will be processed.

DATED this 15th day of October, 2013.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge

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